Supreme Court, U.S.
FILED
JUL 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1945

In The

Supreme Court of the United States

October Term, 1989

LAURINE BROWN (LaMAR),

Petitioner,

v.

FOX VALLEY & VICINITY CONSTRUCTION WORKERS PENSION FUND, DESSIE BROWN, AND ALL UNKNOWN CLAIMANTS,

Respondents.

On Petition For a Writ of Certiorari To the United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit properly held that ERISA does not preclude a non-participant's waiver, by marital settlement agreement, of an interest in the participant's pension plan benefits.

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STATEMENT OF THE CASE

As all parties agree that the facts are not in dispute, respondent Dessie Brown adopts the statement of facts contained in the decision of the Seventh Circuit Court of Appeals, En Banc, March 9, 1990, attached as appendix pages A-2 to A-4 of petitioner Laurine Brown's Petition For Writ of Certiorari.

REASONS FOR DENYING THE WRIT

INTRODUCTION

This is not an appropriate case for the exercise of this Court's certiorari jurisdiction. No conflict exists among the circuits, nor does the Seventh Circuit's opinion conflict with any applicable decisions of this Court. Although a case of first impression under ERISA, the Seventh Circuit correctly decided the issues presented below.

I. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT ERISA'S ANTI-ALIENATION PROVISIONS WERE NOT VIOLATED SINCE THE ACTUAL PLAN BENEFITS WERE PRESERVED

A focus of the Seventh Circuit's opinion, and petitioner's argument seeking review of same, is the ERISA provision prohibiting the alienation or assignment of plan benefits, 29 U.S.C. Sec. 1056(d)(1). As a bar to the unwise or ill-conceived transfer of benefits, ERISA contains this "spendthrift" provision, insulating benefits from actions which could compromise their availability to the plan participant. *AT&T v. Merry*, 592 F.2d 118 (2d Cir. 1979).

This prohibition against alienation or assignment guarantees that the participant's accrued benefits are available at the time of retirement. H.R. Rep. No. 807, 93d Cong. 2d Sess. 1974 reprinted in 1974 U.S. Cong. and Admin. News, 4670, 4734.

The Seventh Circuit properly found that ERISA's spendthrift provisions apply to a plan's participant, not to a waiver of the right to receive those benefits by a non-participant. Here, the decedent/participant made no disposition of his interest in the plan assets by entering into the subject marital settlement agreement. Indeed, the full amount of the participant's accrued benefit was preserved and remains available for distribution pending the conclusion of this appeal.

Petitioner asserts that the waiver contained in her marital settlement agreement does not meet the requirement of a qualified domestic relations order ("QDRO"), and was therefore ineffective and should be ignored. The requirement of a QDRO, a limited exception to ERISA's anti-alienation provisions, is incorporated in the ERISA amendments found in the Retirement Equity Act of 1984, Pub.L. No. 98-397, 98 Stat. 1433 (1984) (hereinafter "REA").

Assuming that the technical requirements of a QDRO are met, 29 U.S.C. Sec. 1056(d)(3)(B)-(E), a qualified domestic relations order recognizes the right of a spouse, former spouse, child or other alternate payee of a plan participant to receive plan benefits otherwise payable to the participant. A QDRO, therefore, is the proper method to preserve the interests of a former spouse in pension benefits.

Petitioner asserts that since the waiver incorporated in her marital settlement agreement is not a QDRO, it is preempted by ERISA's anti-alienation provisions. However, petitioner's argument misapprehends the purpose of a QDRO, which creates a means for non-participants to claim a right to plan benefits, and a method of protecting the interest of the non-participant in those benefits. See S.Rep. No. 575, 98th Cong., 2d Sess. 1984, reprinted in 1984 U.S. Code Cong. and Admin. News, 2547, 2565.

Petitioner's argument ignores the difference between a QDRO's assignment of a participant's interest in plan benefits and a non-participant's waiver of an interest in those benefits, which occurred here. Simply put, the QDRO creates a right to receive benefits, a proper waiver extinguishes any right. No right was created here. Instead, as the Seventh Circuit properly found, QDRO requirements do not apply where a non-participant specifically waived her interest in plan benefits.

Petitioner's argument also ignores other ERISA provisions allowing a non-participant to waive a beneficial interest in plan benefits. 29 U.S.C. Sec. 1055(c)(1)(A)(i) (spousal waiver of interest in joint and survivor form of benefit).

The Seventh Circuit correctly decided that petitioner's waiver of interest did not violate ERISA's anti-alienation provisions, and properly rejected her assertion that the waiver was void for failure to comply with the technical requirements of a QDRO.

II. THE SEVENTH CIRCUIT PROPERLY FASHIONED A FEDERAL COMMON LAW REMEDY TO GOVERN THIS ERISA DISPUTE

A. Where ERISA is Silent on an Issue, Federal Courts are Granted Authority to Determine a Federal Common Law Remedy

The Seventh Circuit recognized that the issue presented is a question of first impression under ERISA. Where, as here, ERISA is silent on the issue presented, federal courts are charged with the responsibility of fashioning a federal common law rule to govern the dispute. *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986). Congress fully anticipated and intended that federal courts would develop a body of common law to resolve disputes which could not be decided by a review of ERISA's text. *Franchise Tax Board of California v. Construction Laborer's Vacation Trust, et al.*, 103 S.Ct. 2841 (1982); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980); H.R. Conf. Rep. No. 93-1280, p. 327 (1974).

Assuming that state law is consistent with the provisions of the federal statutes sought to be construed, analysis of state law can be a proper basis for determining the federal common law remedy. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985).

The district court analyzed Illinois law, finding that case law interpreting an ex-spouse's right to life insurance proceeds was properly analogous to the facts presented here. In Illinois (and, as the Seventh Circuit found, in "many states") a divorce decree bars an ex-spouse's right to receive life insurance proceeds if it includes a clear and specific waiver of that right. *O'Toole v. Central*

Laborers' Pension and Welfare Funds, 12 Ill.App. 3d 995, 299 N.E. 2d 392 (1973).

The district court, and the Seventh Circuit found that the waiver at issue met the requirements of clarity and specificity, and therefore enforced petitioner's renunciation of the benefit.

The district court performed its obligation in determining a well-grounded common law remedy where ERISA was silent on the issue presented, and was properly upheld by the Seventh Circuit.

B. The Seventh Circuit's Decision Promotes Uniform Application of ERISA

Contrary to petitioner's assertion, the Seventh Circuit's decision promotes uniformity and predictability in the application and enforcement of ERISA.

As here, when a statute is silent and provides no guidance on the issue presented, the stated goals of uniformity and predictability are achieved mainly through the creation of federal common law. Instead of undermining the statutory framework of ERISA, as suggested by petitioner, the district court's enunciation of common law principles adds to the decisional precedent critical to preserving the intent and application of the statute.

As found by the district court, the enforcement of petitioner's waiver remains entirely consistent with ERISA policy, insofar as upholding the waiver denying the benefit to petitioner supports the policy favoring the QDRO as the proper vehicle for preservation of an ex-spouse's interest in plan benefits.

Since the creation of federal common law here enhances ERISA's goals of uniformity and predictability, and the common law remedy is entirely consistent with ERISA policy, respondent respectfully requests that the petitioner's writ of certiorari be denied.

III. THE SEVENTH CIRCUIT'S DECISION CREATES NO NEW DUTIES OR OBLIGATIONS ON PENSION PLAN ADMINISTRATORS

Despite petitioner's claim, the Seventh Circuit clearly stated that it was imposing no new investigative duties or obligations on plan administrators. The court reiterated that pursuant to ERISA, plan administrators currently have an existing duty to review a participant's marital background before paying benefits.

This existent duty is not expanded by the Seventh Circuit ruling. Instead, the court held only that a waiver contained in a marital settlement agreement is effective if it becomes known to the plan administrator before payment of the benefit.

Petitioner's argument also ignores the fact that throughout the prior appeals, the Fund filed briefs agreeing that the district court's holding was a reasonable interpretation of the law, provided valuable guidance, and would not subject the plan administrator to additional burdensome obligations. To the contrary, the Fund contended that a failure to uphold the waiver would have resulted in greater difficulty for administrators.

As stated by the Seventh Circuit, "(T)he Fund in its brief concurs in the result we reach." As no new duties or obligations on plan administrators were imposed by the

Seventh Circuit's ruling, respondent respectfully requests that this Court deny petitioner's writ of certiorari.

CONCLUSION

For the foregoing reasons, respondent requests that petitioner's writ of certiorari be denied by this Court.

Respectfully submitted,

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